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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

KIMBERLY B. ELLERTH,

Cross-Petitioner,

vs.

BURLINGTON INDUSTRIES, INC.,

Cross-Respondent.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. From which source do the "agency principles" determining the standard of employer liability for Title VII hostile environment sexual harassment cases derive, following this Court's directive in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), and its citation to the Restatement (Second) of Agency; and

2. What is the standard for employer liability in cases of supervisory hostile environment sexual harassment under Title VII.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Alice Jansen and Packaging Corporation of America were parties before the Court of Appeals (No. 96-1361) due to consolidation of their case with the instant case for decision. The Equal Employment Opportunity Commission (EEOC) participated in the briefing and oral argument of this case as *amicus curiae*.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provision Involved	2
Statement of the Case	2
A. Facts of the Case	3
B. Procedural History of the Case	6
Reasons for Granting the Writ	11
I. The Petition Should Be Granted Because The Circuit Courts Of Appeal Are In Conflict Regarding Which Theory Of Agency To Apply In Determining Employer Liability In Cases Of Title VII Hostile Environment Sexual Harassment By A Supervisor.	11

Contents

Page

II. Courts Should Look To The Restatement (Second) Of Agency For Guidance And To State Law For The Rule Of Decision In Determining Whether An Employer Is Liable For Hostile Environment Sexual Harassment By A Supervisor Under Title VII. 14

III. In Cases Of Title VII Hostile Environment Sexual Harassment By A Supervisor, Employers May Be Held Liable Under A Scope Of Authority Analysis. 17

IV. In Cases Of Title VII Hostile Environment Sexual Harassment By A Supervisor, Employers May Be Held Liable Under A Delegated Authority Analysis. 20

V. In Cases Of Title VII Hostile Environment Sexual Harassment By A Supervisor, Employers May Be Held Liable Under A Negligence Theory With A Heightened Duty Of Care. 21

Conclusion 24

TABLE OF CITATIONS

Cases Cited:

Andrade v. Mayfair Management, Inc., 88 F.3d 258 (4th Cir. 1996) 13

Contents

	Page
Atherton v. FDIC, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997)	15
Board of Directors, Green Hills Country Club v. The Human Rights Commission, 162 Ill. App. 3d 216, 113 Ill. Dec. 216, 514 N.E. 2d 1227 (5th Dist. 1987)	16
Bouton v. BMW of North Am. Inc., 29 F.3d 103 (3d Cir. 1994)	12
Chamberlain v. 101 Realty, Inc., 915 F.2d 777 (1st Cir. 1990)	14
City of Chicago v. Matchmaker Real Estate Sales Cntr., Inc., 982 F.2d 1086 (7th Cir. 1992)	18
Davis v. City of Sioux City, 115 F.3d 1365 (8th Cir. 1997)	14
Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)	16
Faragher v. City of Boca Raton, 111 F.3d 1530 (11th Cir. 1997) (*en banc*)	11, 12
Gary v. Long, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995)	13
Harris v. Forklift Sys., Inc., 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)	19

Contents

Page

Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997) 12

Hicks v. The Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) 12

Hirschfield v. New Mexico Corrections Dep't, 916 F.2d 572 (10th Cir. 1990) 21

Huddleson v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988) 20

Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1986) 21

Jansen v. Packaging Corp. of Am. case (95-3128) .. 2, 7, 8, 23

Kauffman v. Allied Signal, Inc., Autolite Div., 970 F.2d 178 (6th Cir. 1992), *cert denied*, 506 U.S. 1041, 113 S. Ct. 831, 121 L. Ed. 2d 701 (1992) 12

Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994) 11, 12, 20

Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) 13

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) 13

Martin v. Cavalier Hotel Corp., 48 F.3d 1343 (4th Cir. 1995) 12, 13, 18

Contents

	Page
Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)	i, 8, 11, 15, 23
Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994)	14
Perry v. Harris Chernin, Inc., No. 96-2259, 1997 U.S. App. LEXIS 27271 (7th Cir. October 6, 1997)	8
Pfau v. Reed, 1997 U.S. App. LEXIS 29670 *21 (5th Cir. 1997)	14
Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993)	12
Saxton v. American Tel. & Tel. Co., 10 F.3d 526 (7th Cir. 1993)	21
Shager v. Upjohn, 913 F.2d 398 (7th Cir. 1990)	21
Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987)	11, 12, 20
Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989)	21
Tomka v. The Seiler Group, 66 F.3d 1295 (2d Cir. 1995)	20
Torres v. Pisano, 116 F.3d 625 (2d Cir. 1997)	12
Turner/Ozanne v. Hyman/Power, 111 F.3d 1312 (7th Cir. 1997)	15

Contents

Page

United States v. Balistrieri, 981 F.2d 916 (7th Cir. 1992) 18

Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987) 12

Young v. Bayer Corp., 123 F.3d 672 (7th Cir. Sept. 5, 1997) 23

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

28 U.S.C. § 1367(a) 2

28 U.S.C. § 1652 16

42 U.S.C. § 1981a(b) 10

42 U.S.C. § 2000e *et seq.* 2

42 U.S.C. § 2000e(b) (1988) 14

42 U.S.C. § 2000e-2(a)(1) 2

Other Authorities Cited:

Restatement (Second) of Agency § 219 13

Restatement (Second) of Agency § 219(1) 1, 2, 6, 17

Contents

	Page
Restatement (Second) of Agency § 219(2)(b)	2
Restatement (Second) of Agency § 219(2)(d) 1, 2, 6, 12, 20, 21	
Restatement (Second) of Agency § 219(2)(d)(cl.2) ...	20
Restatement (Second) of Agency, § 228 (1958)	18
Restatement (Second) of Agency, § 230 (1958)	17
Justice Joseph Story, Commentaries on the Law of Agency (5th ed. 1857)	17

Cross-Petitioner, Kimberly B. Ellerth, respectfully petitions this Court for a writ of certiorari to review that part of the *en banc* decision of the United States Court of Appeals for the Seventh Circuit which: (1) endorsed the creation of a federal common law of agency specifically for Title VII hostile environment sexual harassment cases, rather than looking to the Restatement (Second) of Agency and utilizing state agency law; (2) held that §§ 219(1) and 219(2)(d) of the Restatement (Second) of Agency were inapplicable to the determination of employer liability in supervisor hostile environment cases; and (3) held that employer liability for supervisor hostile environment sexual harassment is determined only under a negligence theory.

OPINIONS BELOW

The August 12, 1997 decision of the United States Court of Appeals for the Seventh Circuit, *en banc*, can be found at App. 1a-208a.[1] The November 27, 1996 three-judge panel opinion of the Seventh Circuit is located at App. 209a-239a. The January 19, 1996 opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is located at App. 241a-287a.

STATEMENT OF JURISDICTION

The judgment of the *en banc* panel of the United States Court of Appeals for the Seventh Circuit was entered on August 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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1. All references in this cross-petition to "App." followed by a number or numbers are intended to refer to a page or pages in the appendix to Burlington's petition for a writ of certiorari.

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, November 21, 1991, 42 U.S.C. § 2000e-2(a)(1):

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin.

STATEMENT OF THE CASE

Kimberly B. Ellerth ("Ellerth") brought this suit against Petitioner, Burlington Industries, Inc. ("Burlington"), in the United States District Court for the Northern District of Illinois, Eastern Division, alleging sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1964, as amended, November 21, 1991 ("Title VII"). The district court's jurisdiction over the case was under Title VII, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.* Federal question jurisdiction in the district court was under 28 U.S.C. § 1331, and pendant jurisdiction for the constructive discharge claim was under 28 U.S.C. § 1367(a).

In the *en banc* opinion below (joined to the *Jansen v. Packaging Corp. of Am.* case (95-3128)), the Seventh Circuit, in a *per curiam* opinion, rejected the application of § 219(2)(d) and § 219(1) of the Restatement (Second) of Agency[2] ("Restatement") in cases of hostile environment sexual

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2. All references in this cross-petition to "§ 219(1)," "§ 219(2)(b)," and "§ 219(2)(d)" are intended to refer to sections of the Restatement (Second) of Agency (1958).

harassment by a supervisor, holding that a negligence theory was the proper standard for employer liability in such cases. Ellerth's constructive discharge claim was not addressed as such by the *en banc* court.

A. Facts of the Case

Ellerth was employed by Burlington Industries, Inc. ("Burlington") from mid-March, 1993 until May, 1994 as a Merchandising Assistant at the Chicago office. During Ellerth's employment interview with Theodore Slowik ("Slowik"), Vice President of Sales and Marketing, Slowik stared at Ellerth's chest and legs and asked Ellerth if she was married, if she planned on having a family, and if she was "practicing" to have a family.

Ellerth was required to speak with Slowik by telephone about once per week. These conversations included sexual innuendos by Slowik, such as: "How are those legs of yours, Kim?"; are you still practicing to have a family with your husband?; and "it must be hard for a woman like you, Kim, to have a job like that — a woman with great legs."

During Ellerth's New York training trip in the summer of 1993, Slowik told her approximately four offensive sexual jokes. During a lunch meeting, also attended by Angelo Brenna ("Brenna"), Vice-President of International Sales, Slowik told "well over ten" offensive sexual jokes and grabbed Ellerth's knee under the table. Slowik also stated, "you have got great legs, Kim. What do you think Angelo?" as he stared at Ellerth's legs. After the meeting, Ellerth complained to Marilyn, "sample" person, and Laura Peffal, Customer Service Representative, about Slowik's behavior.

During Ellerth's training trip to Greensboro, North Carolina, and in front of a Sales Representative named Dan, Slowik made

loud and obnoxious statements about a waitress's appearance. At the hotel lounge, Slowik told Ellerth that the female band members had nice breasts, nice legs, and nice, skimpy outfits, as he engaged in prolonged looks at Ellerth's legs and breasts, stating, "[y]ou are a little lacking in that area, aren't you, Kim?" Slowik told Ellerth that she "ought to loosen up," and stated, "You know, Kim, I could make your life very hard or very easy at Burlington."

In the fall of 1993, at the Chicago office, when Ellerth was folding fabric samples on the floor, Slowik approached with another employee and stated, "on your knees again, Kim," in reference to fellatio. As Slowik sat at Ellerth's desk making phone calls, he stated, "it's nice to have my butt where your butt was, Kim."[3] At the company party in December, 1993, Slowik patted Ellerth's butt, approached Ellerth's husband, patted him on the shoulder and stated, "you are a lucky man to have a woman like that."

Between January and March, 1994, Ellerth complained to Donna Thibideau ("Thibideau"), Burlington's Customer Service Manager, about the sexual harassment by Slowik. Thibideau informed Ellerth that Ann Pillow may also have been sexually harassed by Slowik.[4] At Ellerth's March, 1994 performance

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3. Although the district court ruled that pre-December 20, 1993 comments did not fall within the "continuing violation" doctrine, it was made clear that "this does not require that an 'iron curtain' be dropped on December 20, 1993, shielding from consideration all evidence of Slowik's conduct before that day . . .". (App. 261a.) The district court further stated that it would be "absurd to conclude that Slowik's conduct after December 20, 1993 had to be evaluated in a vacuum and without the context of his prior conduct." (App. 262a.)

4. Ellerth also complained to Sherry Hester, Customer Service Representative; Brent Schneider, Sales Representative; Patrick Crosson, Sales Representative; a Burlington customer, Cara Jimenez; and to Slowik about the sexual harassment.

review, Slowik told Ellerth that he had told other employees that she was "arrogant" because she was not "loose enough" for him, and that this gave him hesitations about promoting her. Slowik rubbed Ellerth's knee during the interview, and, stated, "isn't your husband going to miss you [when you travel]?" When Slowik later told Ellerth that she had received the promotion, he made a sexual comment. Also in March, 1994, at the San Francisco bedding conference, while staring at Ellerth's "back-end," Slowik made a comment to Ellerth about her "ass."

When Ellerth asked Slowik for special permission to do a project for a customer in May, 1994, Slowik responded "I don't have time for you right now, Kim — unless you tell me what you are wearing." Slowik later denied the permission and asked, "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier."

On May 31, 1994, Ellerth left an answering machine message with Patrick Lawrence ("Lawrence")[5] stating that she was quitting, and telefaxed him a letter to the same effect.[6] About three weeks later, Ellerth sent another letter to Lawrence.[7]

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5. Lawrence became Ellerth's direct supervisor after her promotion. Lawrence, in turn, reported to Slowik. Prior to her promotion, Ellerth reported directly to Mary Strenk Fitzgerald, National Accounts Manager, who reported to Slowik.

6. Ellerth whited-out the portion of the letter regarding sexual harassment with correction fluid, at the suggestion of her husband. The whited-out portion of the letter read:

> What I did not want to mention to you was the fact that Ted [Slowik] had harassed me in the past and I simply ignored him to save my job. . . . Needless to say, these incidents could be seen as sexual harassment. . . . What a shame that one man can have such an influence.

7. This second letter stated:

(Cont'd)

B. Procedural History of the Case

Burlington moved for summary judgment against Ellerth in the United States District Court for the Northern District of Illinois, Eastern Division, claiming that: (1) the alleged sexual harassment was not sufficiently severe or pervasive to constitute a hostile environment; (2) there was not sufficient notice to the employer to impute liability; and (3) Ellerth's conditions were not so intolerable as to constitute constructive discharge. The district court held that a question of fact existed as to whether the sexual harassment was sufficiently severe and pervasive to constitute a hostile environment against Ellerth. The district court, however, granted Burlington's summary judgment motion on the ground that agency principles did not impute liability to the employer for that harassment or for constructive discharge. (App. 261a-280a, 286a.) In reaching its decision, the district court analyzed §§ 219(1) and 219(2)(d) of the Restatement and concluded that these sections did not lead to employer liability in the context of sexual harassment. (App. 266a-280a.) The district court further held that Ellerth's complaints to the Customer Service Manager and other employees did not lead to employer liability under a negligence theory. (App. 273a, n.12).

A three-judge panel of the Seventh Circuit reversed the district court on all issues before it. Citing to § 219(1) of the Restatement, this panel held that a question of fact existed as to

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(Cont'd)

> Before I was hired, you and I spoke about the reasons why Ted [Slowik] didn't feel comfortable around me. I told you that he had said some sexually inappropriate things to me in the past. What I didn't tell you was that he had, on two occasions, patted my rear, and every time he saw me looked me up and down like a piece of meat. . . . My entire time at Burlington, I had to ignore Ted [Slowik] and try to do what I needed to do in my job.

whether Burlington was liable for the alleged hostile environment sexual harassment by Slowik under a "scope of authority" analysis. (App. 223a-233a.) The panel also stated that Ellerth's "failure to complain formally under Burlington's sexual harassment policy will not be fatal to her claim," and held that her complaints to other Burlington employees and supervisors may be pertinent on remand, as well. (App. 239a.)

The Seventh Circuit thereafter granted Burlington's petition for rehearing *en banc*, and the three-judge panel decision was vacated. The 203-paged Seventh Circuit *en banc* decision consisted of a *per curiam* decision, and included eight (8) separately-authored opinions. Within the first paragraph of the *per curiam* decision it is stated that "[u]nfortunately, a majority of the judges have not converged upon a single rationale for the resolution of all the issues in these cases." (App. 2a.) The decision also stated that "perhaps the Supreme Court will bring order to the chaotic case law in this important field of practice." (App. 7a.)

The majority of the *en banc* panel of the Seventh Circuit maintained the judicially-created distinction between hostile environment and *quid pro quo* cases and held that a negligence theory applied in cases of hostile environment sexual harassment by a supervisor.[8] (App. 5a, 7a.) An arguable majority of the judges offered further clarification of this holding by stating that a heightened duty applied in hostile environment cases where the supervisor is the harasser.[9] Judge Cudahy's separate

8. The following judges held that a negligence theory applied in cases of hostile environment sexual harassment by a supervisor: Judges Flaum, Cummings, Bauer, Cudahy (in *Jansen*), Kanne, Evans, Coffey, Manion, and Chief Judge Posner.

9. The following judges supported a negligence with heightened duty of care standard for supervisor hostile environment sexual harassment: Judges Flaum, Cummings, Bauer, Cudahy (in *Jansen*) and (Cont'd)

opinion[10] stated that negligence with a heightened duty of care was the appropriate standard and posited that the end result from this standard would be the same as under a scope of authority analysis. (App. 29a.) The separately-authored opinion of Judge Diane P. Wood[11] (joined by Easterbrook and Rovner, J.J.), discussed the application of state agency law and stood by the vacated three-judge panel decision applying a scope of authority analysis, as did the separate opinion of Judge Easterbrook. (App. 143a-152a, 174a-176a.)

Much of the volume of the 203-page *en banc* decision was related to the issue of where to look for the agency principles in light of this Court's directive in *Meritor Savings Bank, FSB v. Vinson*, to "look to agency principles for guidance," citing specifically to the Restatement. 477 U.S. 57, 72, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).

(Cont'd)
Evans. In Judge Kanne's separate concurrence, he stated that although he does not agree with the label "heightened duty of care," the "training, authority, and control given supervisors by an employer will . . . always enter the negligence equation." (App. 34a.) Chief Judge Posner (joined by Judge Manion) stated that a negligence standard with a "heightened duty of care" applies "as a practical matter," which "may require the creation of additional complaint machinery when the complaint is against a supervisor." (App. 48a.) *But see Perry v. Harris Chernin, Inc.*, No. 96-2259, slip. op. at 6-7, n.2, 1997 U.S. App. LEXIS 27271 (7th Cir. October 6, 1997) (stating that heightened duty of care approach "did not garner support from a majority of the [*Jansen/Ellerth*] court").

10. In No. 95-3128 (*Jansen*) only.

11. References herein to "Judge Wood" are intended to refer to Judge Diane P. Wood (as opposed to Judge Harlington Wood, Jr., who did not participate in the decision below).

Chief Judge Posner's concurrence and dissent stated that the "common law of agency has stood the test of time," but that Title VII and the "novel and atypical tort of sexual harassment" present "a question of agency that the federal courts must by default answer as a matter of federal common law." (App. 36a, 39a.) The plurality opinion authored by Judge Flaum stated that the Restatement and state law on agency should not be relied upon because Title VII remedies would become "heavily dependent upon vagaries of regionalism." (App. 8a and 8a, n.1.) Judge Coffey stated that the Restatement, not state law or a new federal common law of agency, should be utilized, and provided reasoning as to why the Restatement provides liability for employers only under a negligence theory in sexual harassment cases (although perhaps under a delegated authority theory in certain circumstances). (App. 63a, 107a-108a.) Judge Manion's opinion endorsed the approach of Chief Judge Posner and stated that the Restatement should not be used in the context of sexual harassment as it predates that tort. (App. 154a, 161a-162a.)

Judge Easterbrook stated that "[w]hen a federal statute is silent, we obtain the necessary rule from state law, unless application of state law would undermine a federal norm." (App. 143a-144a.) Judge Easterbrook explained that " 'agency principles' come from state law, as the Court implied by citing the Restatement of Agency, a distillation of the decisions by state courts," and stated that "Title VII is no different, in needing the assistance of state law principles, from the antitrust, aviation, banking, securities, and other civil rights laws . . .". (App. 143a-145a.) The opinion authored by Judge Wood agreed with this analysis, and stated that "state law must furnish the rule of decision" with the Restatement standing as "a useful reference point for the common law of agency." (App. 183a.) Judge Wood further stated that

> neither this court nor any other has had any trouble

> applying these agency principles to the various claims of discrimination apart from sexual harassment that are cognizable under Title VII and related laws.[12]

(App. 190a.)

The *per curiam* decision concluded that the principle that a negligence theory applies in supervisor hostile environment sexual harassment cases "will bind the panels of this court and the district courts of this circuit until the Supreme Court resolves these issues." (App. 7a.)

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12. Throughout the *en banc* decision, another point of contention regarded the purpose(s) of Title VII's proscriptions against sexual harassment. In their hostile environment discussions, several judges focused exclusively on Title VII's goal of deterrence in formulating their reasoning, without reference to the Civil Rights Act of 1991, 42 U.S.C. § 1981a(b). (*See* opinions by Judges Flaum, Kanne, and Chief Judge Posner at App. 14a, 33a, 44a.) Chief Judge Posner explained that he "emphasize[d] *deterring* sexual harassment rather than *compensating* its victims because, unlike many torts . . . sexual harassment does not usually bring about a significant change in the victim's wealth." (App. 44a) (emphasis in original). On the other end of the spectrum, Judge Wood's opinion stated that "we should not trivialize the harm that harassment can inflict" which can include "both severe psychological harm and pecuniary injury from decreased productivity and loss of job opportunities." (App. 190a.)

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE CIRCUIT COURTS OF APPEAL ARE IN CONFLICT REGARDING WHICH THEORY OF AGENCY TO APPLY IN DETERMINING EMPLOYER LIABILITY IN CASES OF TITLE VII HOSTILE ENVIRONMENT SEXUAL HARASSMENT BY A SUPERVISOR.

A conflict exists in the circuits, and within the Seventh Circuit, as to the proper agency principles to utilize in determining employer liability for Title VII hostile environment sexual harassment by a supervisor. In the instant case, the majority of the *en banc* panel of the Seventh Circuit held that the distinction between *quid pro quo* and hostile environment forms of sexual harassment should be maintained, and that a negligence theory applies in cases of hostile environment sexual harassment by a supervisory employee.[13]

Maintenance of the artificial distinction between *quid pro quo* and hostile environment forms of sexual harassment is contrary to the law of the Second and Eleventh Circuits, which utilize a uniform mode under agency principles for analyzing employer liability for all sexual harassment. *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987); *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1536 (11th Cir. 1997) (*en banc*).

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13. *See supra*, n.9. Reliance on a traditional negligence theory is contrary to this Court's ruling in *Meritor*, 477 U.S. at 72, that "absence of notice to an employer does not necessarily insulate that employer from liability."

The Seventh Circuit *en banc* panel's ruling that a negligence theory applies in cases of "hostile environment" sexual harassment is contrary to the law of the Second, Tenth and Eleventh Circuits, which held that an employer is liable for hostile work environment sexual harassment when a supervisor used his delegated authority to facilitate the harassment of a subordinate employee under § 219(2)(d) of the Restatement. *Karibian*, 14 F.3d at 780; *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443-46 (10th Cir. 1997) (stating that D.C. Circuit's interpretation of § 219(2)(d) "effectively merges the two clauses"); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993); *Hicks v. The Gates Rubber Co.*, 833 F.2d 1406, 1418 (10th Cir. 1987); *Sparks*, 830 F.2d at 1559-60; *Faragher*, 111 F.3d at 1536.

The Third Circuit, in *Bouton v. BMW of North Am. Inc.*, 29 F.3d 103, 107, 109-10 (3d Cir. 1994), adopted a more narrow approach to § 219(2)(d), holding that liability for sexual harassment by a supervisor can be imputed where the plaintiff reasonably believed the supervisor had apparent authority, although an effective grievance procedure would eradicate apparent authority and shield the employer from liability.

Also inconsistent with the reliance only on a negligence theory in the instant case, the Sixth Circuit applied a type of "scope of employment" analysis in supervisor hostile environment cases, examining such factors as "*when* the act took place, *where* it took place, and whether it was *foreseeable*." *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 183 (6th Cir. 1992) (emphasis in original), *cert denied*, 506 U.S. 1041, 113 S. Ct. 831, 121 L. Ed. 2d 701 (1992) (employer not liable, however, as it took prompt and appropriate corrective action), *citing Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987). *See also Faragher*, 111 F.3d 1530 (dissenting opinions of Judge Barkett and Judge Anderson); *Martin v. Cavalier Hotel Corp.*,

48 F.3d 1343 (4th Cir. 1995); App. 189a-190a, 192a, 227a-228a (collecting non-sexual harassment cases applying scope of authority analysis).

In *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996), the Fourth Circuit held that "sexual harassment is an illegal corporate activity, beyond the scope of [low-level] supervisors' employment" and that the employer is liable for supervisor hostile environment sexual harassment only if it "knew or should have known of the illegal conduct and failed to take prompt and appropriate corrective action." *Andrade*, 88 F.3d at 261, *citing* § 219 of the Restatement, generally; *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983). *See also Martin*, 48 F.3d 1343, 1351 ("determination of whether an employee's acts are within the scope of his employment requires an examination of when the act took place, where it took place, and whether it was foreseeable").

It is very difficult to discern, amongst the remaining negligence-employing circuits, what distinctions, if any, are drawn between an application of a traditional negligence theory and the application of a type of heightened duty of care negligence analysis in supervisor hostile environment cases. It is also difficult to discern, in many cases, from which specific source the underlying principles regarding employer liability are drawn.

The D.C. Circuit, in *Gary v. Long*, 59 F.3d 1391, 1398 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995), held that a "knew or should have known" standard applied, finding that § 219(2)(d) of the Restatement was inapplicable to sexual harassment cases as the plaintiff "could not have believed (nor does she claim) that [the sexual harasser] was acting within the color of his authority." *Id.* at 1397-98.

The First Circuit, in *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988), also employed a negligence

"knew or should have known" standard in supervisor hostile environment cases. The First Circuit acknowledged, however, that hostile environment and *quid pro quo* harassment claims "are not always clearly distinct and separate . . . [and] may be complimentary to one another." *Chamberlain v. 101 Realty, Inc.*, 915 F.2d 777, 782 (1st Cir. 1990).

The Fifth, Eighth and Ninth Circuits also applied a negligence theory, holding the employer liable in supervisor hostile environment cases only if the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *Pfau v. Reed*, 1997 U.S. App. LEXIS 29670 *21 (5th Cir. 1997) ("when a supervisor gratuitously insults an employee, he . . . acts outside the actual or apparent scope of the authority he possesses as a supervisor"); *Davis v. City of Sioux City*, 115 F.3d 1365, 1368 (8th Cir. 1997); *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994).

II.

COURTS SHOULD LOOK TO THE RESTATEMENT (SECOND) OF AGENCY FOR GUIDANCE AND TO STATE LAW FOR THE RULE OF DECISION IN DETERMINING WHETHER AN EMPLOYER IS LIABLE FOR HOSTILE ENVIRONMENT SEXUAL HARASSMENT BY A SUPERVISOR UNDER TITLE VII.

A majority of the judges of the *en banc* panel did not look to the Restatement for guidance and to state law to find the applicable agency law for use in cases of sexual harassment by a supervisor, but instead opted for the creation of a federal common law of agency, for use specifically in sexual harassment cases. Title VII defines the term "employer" as "a person engaged in an industry affecting commerce . . . or any agent of such a person." 42 U.S.C. § 2000e(b) (1988). This Court, in

Meritor, 477 U.S. 57, 72, directed the lower courts "to look to agency principles for guidance" in the area of employer liability for sexual harassment, citing to the Restatement.

As explained at length by Judge Easterbrook, "*Meritor* tells us to 'look to,' not 'make up,' agency principles." (App. 143a.) Federal judges are not "free to devise a law of vicarious liability for Title VII cases." (App. 143a.) As Judge Wood's opinion observed, no matter what the supervisor's behavior, it is the law of agency that is "best suited to provide the answer to the question of when the employer must answer for the supervisor's actions." (App. 186a.)

"When a federal statute is silent, we obtain the necessary rule from state law, unless application of state law would undermine a federal norm." (App. 143a, *citing Atherton v. FDIC*, 117 S. Ct. 666, 670, 136 L. Ed. 2d 656 (1997) (collecting cases); *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312 (7th Cir. 1997).) "Who speaks or acts on behalf of a corporation is a fundamental question of corporate organization, all but invariably resolved under state law . . .". (App. 144a.) *Meritor* alluded to state law application by citing to the Restatement, a "distillation of decisions by state courts." (App. 143a, 186a.)

Application of state agency law in the instant context achieves vertical uniformity and coordination between decisions of state administrative agencies/courts and federal courts. (App. 146a-147a.) As explained by Judge Wood's opinion, the majority's suggestion of a new federal common law of agency specifically for sexual harassment cases would leave employers within the state of Illinois (as well as within other states) potentially subject to either state or federal law on the issue, depending upon where the suit against them proceeded.[14] (App.

14. Under Illinois law, "employers [are] strictly liable for sexual (Cont'd)

185a.) This makes it "exceedingly difficult" for employers in Illinois and other states "to establish a single coherent management structure." (App. 185a.) Also, a woman in Illinois who is able to hold her supervisor liable for sexual harassment at the state level, would be unable to do so at the federal level on the same set of facts.[15] (App. 186a.)

As Judge Easterbrook stated,

> if different treatment of the same facts in different states authorized the creation of federal common law . . . a host of cases from the last 20 years using state law to decide subsidiary, but not dispositive, questions in litigation under federal statutes would be overthrown.

(App. 145a (collecting cases), 184a-185a.)

(Cont'd)
harassment of their employees by supervisor personnel regardless of whether the employer knew of such conduct." *Board of Directors, Green Hills Country Club v. The Human Rights Commission*, 162 Ill. App. 3d 216, 220-21, 113 Ill. Dec. 216, 514 N.E. 2d 1227, 1230-31 (5th Dist. 1987). The Illinois Appellate Court specifically held that employers had been strictly liable for both *quid pro quo* and hostile environment supervisory sexual harassment even before a rule was codified by the Illinois legislature adopting this same strict liability standard. *Id.*; 775 ILCS 5/2-102(D). Nonetheless, both state statutes and judicial decisions supply the rule of state law to be applied in the federal context under the Rules of Decision Act, 28 U.S.C. § 1652. (App. 147a-148a, *citing Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).)

15. Creation of such a federal common law specifically for sexual harassment cases would also do little toward achieving horizontal uniformity at the federal level. (App. 150a.) The approximately 200 federal judges in the thirteen federal courts of the nation are "bound to see these issues differently" (as is illustrated in the instant case), and the Supreme Court "lacks the time (and may lack the inclination) to superintend a national body of agency law." (App. 150a.)

Since Title VII does not provide its own definition of "agent," and precedent clearly indicates that state law should be utilized in such cases, courts should look to the Restatement as a "useful reference point for the common law of agency" and to state law for the rule of decision in sexual harassment and other Title VII cases. (App. 5a, 183a-184a.)

III.

IN CASES OF TITLE VII HOSTILE ENVIRONMENT SEXUAL HARASSMENT BY A SUPERVISOR, EMPLOYERS MAY BE HELD LIABLE UNDER A SCOPE OF AUTHORITY ANALYSIS.

Looking to agency principles generally in the instant context, § 219(1) of the Restatement provides for *respondeat superior* liability for hostile environment sexual harassment by supervisors. (App. 5a, 186a.) Under this "scope of employment" analysis, a principal is liable to third persons for the torts of his agent,

> in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them.

(App. 224a, *citing*, *e.g.*, Justice Joseph Story, Commentaries on the Law of Agency (5th ed. 1857).)

"An act, although forbidden, or done in a forbidden manner, may be within the scope of employment." Restatement (Second) of Agency, § 230 (1958).

A critical question under this analysis, is what conduct falls within the scope of employment:

> Conduct of a servant is within the scope of employment if and only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time space and limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master; and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Restatement (Second) of Agency, § 228 (1958). (App. 191a, 226a.)

A scope of employment analysis has been followed by courts in numerous other cases, including cases under Title VII and in sex discrimination cases. *See* App. 189a-190a, 192a, 227a-228a (collecting cases). In *United States v. Balistrieri*, 981 F.2d 916, 930 (7th Cir. 1992), for example, the owner of an apartment building was held liable for the racially discriminatory acts of his rental agent under a scope of authority analysis, though the owner never expressly approved the discriminatory acts. *See also City of Chicago v. Matchmaker Real Estate Sales Cntr., Inc.*, 982 F.2d 1086, 1096 n.12 (7th Cir. 1992) ("[a] principal cannot free itself of liability by delegating to an agent the duty not to discriminate"). In these cases, the focus was on whether the employer had a right to control the servant's actions at the time the tort was committed, not on whether the employer expressly authorized the tort itself. *See Martin*, 48 F.3d 1343 (the test is "whether the service itself in which the tortious act was done was within the ordinary course of such business or within the scope of such authority").

The law of agency applies to sexual harassment cases as well. The question presented by sexual harassment cases is the same as in other cases which turn to the common law of agency for resolution, *i.e.*, what is the relationship between employer, supervisor and subordinate employee, and who is liable for what acts in that relationship. The majority of the Seventh Circuit *en banc* judges would have the question of employer liability turn on the type of conduct at issue (sexual harassment), in addition to the relationship between employer and employee. (App. 182a.) In order to be actionable, however, a hostile environment must be so severe and pervasive as to alter the terms, conditions or privileges of employment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). There is "nothing systematic" that makes severe and pervasive hostile environment sexual harassment "harder to detect than a single, clearly unacceptable, act of '*quid pro quo*' harassment, which could easily occur behind closed doors with only the supervisor and victim as witnesses." (App. 180a.)

In the context of supervisory hostile environment sexual harassment, the proper inquiry is whether the supervisor, acting at least in part with the purpose of serving the employer, committed the acts of harassment as he exercised the actual or apparent authority from the employer to hire, fire, discipline, promote, assign work, etc. (App. 20a, n.7; 193a; 227a.) The inquiry is not whether the employer employed the supervisor for the purpose of engaging in the illegal activity of sexual harassment. (App. 20a, n.7; 193a; 227a.) Also, as an intentional tort, the sexual harassment engaged in must have been foreseeable. Acts such as rape might not be foreseeable, while other types of sexual harassment, engaged in at least in part with the employer's interests in mind, are clearly foreseeable,

as is evidenced by the existence of anti-sexual harassment policies in the workplace. (App. 194a, 228a-229a.)

IV.

IN CASES OF TITLE VII HOSTILE ENVIRONMENT SEXUAL HARASSMENT BY A SUPERVISOR, EMPLOYERS MAY BE HELD LIABLE UNDER A DELEGATED AUTHORITY ANALYSIS.

In place of, or in addition to, other analyses, employer liability for supervisor hostile environment sexual harassment could be determined through the use of a delegated authority analysis, similar to the analysis used by the Second Circuit. *See Karibian*, 14 F.3d 773. Section 219(2)(d) of the Restatement covers situations in which

> the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Under § 219(2)(d), the supervisor, by definition, is acting outside the scope of his employment. Under § 219(2)(d)(cl.2), if a supervisor misapplies the powers delegated to him by the principal, the employer should be held liable for holding him out as agent and enabling him to commit a tort through the use of that delegated authority. (App. 194a-195a, 234a-237a.) Under § 219(2)(d)(cl.2), an employer is liable for hostile environment sexual harassment when a supervisor threatens to fire or alter the working conditions of the subordinate employee if she does not tolerate his sexual harassment. *Karibian*, 14 F.3d at 780. *See also Sparks*, 830 F.2d at 1559-60; *Tomka v. The Seiler Group*, 66 F.3d 1295, 1306 (2d Cir. 1995); *Huddleson v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904-05 (11th Cir. 1988); *Sparks*, 830 F.2d at 1559-60.

In cases where a supervisor did not use the authority delegated to him to facilitate his sexual harassment, § 219(2)(d) would not apply, and the applicable standard would then be the same as the standard for sexual harassment by a co-worker. *See Shager v. Upjohn*, 913 F.2d 398, 405 (7th Cir. 1990) (co-worker sexual harassment so unrelated to employer's business that employer will not be held liable unless through some fault of its own (negligence)); *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1422 (7th Cir. 1986); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 535-36 (7th Cir. 1993); *Hirschfield v. New Mexico Corrections Dep't*, 916 F.2d 572, 579 (10th Cir. 1990); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316-17 (11th Cir. 1989).

V.

IN CASES OF TITLE VII HOSTILE ENVIRONMENT SEXUAL HARASSMENT BY A SUPERVISOR, EMPLOYERS MAY BE HELD LIABLE UNDER A NEGLIGENCE THEORY WITH A HEIGHTENED DUTY OF CARE.

Even if state law, scope of authority and delegated authority analyses were inapplicable to cases of supervisor sexual harassment, employer liability could still be determined by the use of a negligence theory with a heightened duty of care.[16]

16. Although some of the judges in the *en banc* panel were of the opinion that a negligence argument had been waived by Ellerth, three of the judges (Wood, Easterbrook and Rovner, J.J.) stated that negligence had not been waived. (App. 174a, 174a n.1, 206a-207a.) Judge Wood's opinion stated,

> a plaintiff is entitled to prove that the employer "knew or should have known" about the offensive conduct in any way that she can. . . . Ellerth

(Cont'd)

The plurality opinion, authored by Judge Flaum, held that a

> heightened duty of care should apply [in cases of supervisor hostile environment harassment] both in

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(Cont'd)

> complained to a number of Burlington employees about Slowik, including most notably Donna Thibideau, Burlington's Customer Service Manager. Thibideau thought this may not have been the first time Slowik had behaved inappropriately.

(App. 207a.)

In addition, the sentence relied upon as constituting the waiver is erroneously cited in the decision below as appearing in the answer to the petition for rehearing *en banc*. (App. 59a.) The sentence appeared in the reply brief to Burlington's answer to the Appellant's Brief, was immediately discussed at oral argument as being incorrect, and the facts from the briefs supporting a negligence theory were reiterated. Both sides continued to argue negligence and the three-judge panel decision that followed held that Ellerth had not waived negligence. (App. 206a-207a, 239a.) As Judge Wood's opinion later stated, the "conclusion that Slowik acted within the scope of his authority makes it unnecessary for me to reach the negligence issue." (App. 206a.)

> It is ironic that those who criticize undue reliance on the Restatement have seized on Ellerth's passing reference to its language as a way of finding that she waived the right to support her hostile environment allegations on a negligence theory; one can reject the Restatement and still turn to Title VII rules on negligence.

(App. 206a-207a.)

"If negligence were the standard for her 'hostile environment' claim, I would find that Ellerth is entitled to reach a jury on this theory." (App. 174a, 206a-207a.)

> terms of the machinery available to complain of harassment and in terms of a company's duty to investigate and respond effectively to such complaints.

(App. 25a.)

While an arguable majority of the *en banc* panel judges held that a negligence with a heightened duty of care standard applied in supervisor hostile environment cases (*see supra*, n.9), it is unclear what this standard would entail, *e.g.*, "closer monitoring? a more flexible notice requirement? a duty to take more extensive preventive measures?"[17] (App. 194a.) In addition, Judge Flaum's approach assumes that victims will engage in prompt reporting of the harassment. (App. 24a, 31a.) Accounting for a victim's fear of reporting the harassment, Judge Cudahy stated the standard should be that, "if a situation in a company were sufficiently severe to amount to a hostile environment, it [is] by the same token sufficiently visible to put the employer on constructive notice." (App. 31a.) Judge Cudahy suggested the creation of a rebuttable presumption that if the sexual harassment "is severe enough to create a hostile environment, the employer is on constructive notice that remedial measures are required." (App. 31a.) *See Meritor*, 477 U.S. at 72 (rejecting view that "mere existence of grievance procedure and a policy against discrimination . . . must insulate [the employer] from liability"). Adopting a standard such as Judge Cudahy's "rebuttable presumption" approach would clarify the heightened duty of care standard for employers, while potentially "converg[ing]" with a "scope of authority" analysis on the "bottom line." (App. 29a.)

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17. The Seventh Circuit's post-*Jansen/Ellerth* decisions have not, thus far, further elucidated the standard of care in these circumstances. *See, e.g., Young v. Bayer Corp.*, 123 F.3d 672 (7th Cir. Sept. 5, 1997) (holding that complaint of sexual harassment by victim to department head sufficient to constitute notice to employer).

CONCLUSION

Accordingly, the Cross-Petitioner respectfully requests that her petition for a writ of certiorari be granted.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

KIMBERLY B. ELLERTH,
Cross-Petitioner,

v.

BURLINGTON INDUSTRIES, INC.,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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APP

CROSS-RESPONDENT'S BRIEF IN OPPOSTION

Cross-respondent Burlington Industries, Inc. respectfully requests that the petition of cross-petitioner, Kimberly B. Ellerth for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit be denied.

STATEMENT OF THE CASE

Cross-respondent, Burlington Industries, Inc. ("Burlington"), adopts and incorporates herein the Statement of the Case presented in its Petition for a Writ of Certiorari in the instant cause (No. 97-569).

REASONS FOR DENYING THE WRIT

I. ELLERTH'S CROSS-PETITION HAS BEEN PREEMPTED BY *FARAGHER*

Both of the questions which Ellerth argues that this Court should grant certiorari in order to consider, 1) the proper standard of employer liability in "hostile work environment" sexual harassment cases arising under Title VII of the Civil Rights Act of 1964 and 2) the proper source of agency principles to be used in determining employer liability in such cases, have been preempted by this Court's grant of a writ of certiorari in *Faragher v. City of Boca Raton* (No. 97-282). Because this Court will address these exact issues in deciding *Faragher*, granting Ellerth's cross-petition for certiorari would be duplicative and unnecessary.

II. ELLERTH WAIVED HER NEGLIGENCE CLAIMS IN THE COURT OF APPEALS

Although Ellerth argues in part that a "heightened" negligence standard should govern employer liability in hostile work environment sexual harassment cases, she expressly waived her negligence claims in her briefs submitted to the Court of Appeals below. (App.[1] 6a, 28a) Contrary to Ellerth's statement that only "some of the judges in the *en banc* panel" believed that she had waived her negligence argument, the *per curiam* portion of the panel's opinion states that eight of the eleven judges on the panel concurred in this view. (App. 6a) Thus, to the extent that Ellerth argues that this Court should apply a negligence standard with a heightened duty of care to hostile work envrionment claims, her cross-petition fails to raise an actual claim or controversy and should be denied.

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[1] In this brief, "App." shall refer to the Appendix to Burlington's Petition for Certiorari.

CONCLUSION

The Cross-Respondent respectfully requests that this Court deny the cross-petition for a writ of certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals for the reasons stated above.

Respectfully submitted,

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